

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION TWENTY-FIVE

EXTENDICARE HOMES, INC., d/b/a
BON HARBOR NURSING AND
REHABILITATION CENTER
Employer

and

Case 25-RC-10304

UNITED STEELWORKERS -USW
Petitioner

SUPPLEMENTAL DECISION, ORDER, AND
CERTIFICATION OF RESULTS OF ELECTION

Pursuant to a petition filed on September 20, 2005, and a Decision and Direction of Election issued by the Regional Director on October 27, 2005, an election was conducted on November 29, 2005, among certain employees of the above-named Employer to determine whether or not they desired to be represented by the Petitioner for the purposes of collective bargaining.¹

¹ The appropriate unit as set forth in the Decision and Direction of Election is as follows:

All full-time and regular part-time certified medication assistants, certified nursing assistants, dietary, activities, and maintenance employees employed by the Employer at its Owensboro, Kentucky, facility; BUT EXCLUDING all licensed practical nurses, registered nurses, housekeeping and laundry employees, office clerical employees, managerial employees, and all guards and supervisors as defined in the Act.

On December 2, 2005, the Petitioner timely filed objections to the election.² Following an investigation,³ and for the reasons discussed more fully below, I am overruling the Petitioner's Objections.

I. THE OBJECTIONS

Each of the Petitioner's objections alleges that the Employer made objectionable promises and threats to employees in a document titled "Extendicare Guarantees", which the Employer distributed to employees in the eligible bargaining unit in about November 2005. The Employer concedes that the "Extendicare Guarantees" document was distributed to bargaining unit employees by the Employer's Regional Director of Operations, Larry Boschert, and Administrator, Ed Brazil, from about November 22, 2005, to about November 27, 2005. A copy of this document is attached hereto as Appendix A. The Petitioner limited its objections solely to the content of this "Extendicare Guarantees" document and its objections do not encompass any other Employer actions or statements made during the critical period. The Employer denies that any statement contained in the November 2005 guarantee document is objectionable and argues that each item contained therein is either merely a lawful promise to maintain the employees' existing terms of employment or an accurate reflection of the law.

A. Objection 1

The Petitioner alleges that the Employer promised employees better wages and health care benefits, in return for the employees' rejection of the Petitioner as their exclusive collective bargaining representative.

² A corrected tally of ballots, copies of which were made available to the parties on November 29, 2005, shows the following results:

Approximate number of eligible voters	66
Number of void ballots	0
Number of votes cast for United Steelworkers -USW	23
Number of votes cast against participating labor organization	28
Number of valid votes counted	51
Number of challenged ballots	0
Number of valid votes counted plus challenged ballots	51
Challenges are not sufficient in number to affect the results of the election.	
A majority of the valid votes counted plus challenged ballots has not been cast for United Steelworkers-USW.	

³ Both parties furnished evidence in support of their respective positions.

B. Objection 2

The Petitioner alleges that the Employer threatened employees with discipline and loss of benefits, if they chose the Petitioner as their exclusive collective bargaining representative.

C. Objection 3

The Petitioner alleges that the Employer made misleading predictions about the nature and duration of the collective bargaining process if the Petitioner were selected as the collective bargaining representative, including predictions of loss of benefits and strike activity.

D. Objection 4

The Petitioner generally alleges that, in the “Extendicare Guarantees” document, the Employer made other statements which improperly influenced employees’ ability to freely vote in the representation election.

II. ANALYSIS

A . Objection 1

Two statements in the Employer’s November 2005 “Extendicare Guarantees” document – items 1 and 4 – reference a promise of wages and/or benefits for employees if the Petitioner’s bid to represent the employees were unsuccessful. Item 1 promises a “focal point pay increase” for employees and item 4 promises employees that numerous fringe benefits would not be lost through “trade-offs in union negotiations” if the Petitioner lost the election.

The Employer asserts, and the Petitioner’s witness confirms, that the Employer has had a practice of granting “focal point” pay increases and various fringe benefit programs to employees since before the filing of the instant election petition on September 20, 2005. Testimony from both the objecting Petitioner’s witness and the Employer’s witness confirm that neither the focal point pay increase guaranteed in item 1 nor the various benefit programs guaranteed in item 4 (health, dental and vision insurance, life insurance, BOB benefits⁴, “Smart Plan” benefits⁵, and “You Win” 401(k) benefits) are new benefits being offered to employees; rather, the evidence shows that employees were already offered these benefits by the Employer prior to the filing of the instant petition. The focal point pay increases had been in effect for at least two years and the various benefits mentioned in guarantee number 4 had each been offered for at least the last three years. Even the phrasing chosen by the Employer in guarantee item 4, that employees would not “lose” the listed benefits, clearly indicates that the programs referenced therein were already enjoyed by the employees and were not new benefits being

⁴ Testimony shows that “BOB benefits” refers to the Employer’s existing paid time off work leave system for its employees.

⁵ Testimony established that a “Smart Plan” benefit is Extendicare’s pre-tax dependent care reimbursement program.

offered in exchange for rejecting the Petitioner. The Board has held that it is not unlawful for an Employer to promise employees that it will maintain existing pay and fringe benefits if a union loses a representation election. Weather Shield Mfg., 292 NLRB 1, 2 (1988), citing Crown Chevrolet Co., 255 NLRB 826, fn.3 (1981) and El Cid, Inc., 222 NLRB 1315, fn.7 (1976). The Petitioner has not produced any evidence that the promises of a wage increase and benefits in the Employer's November 2005 document amount to anything more than statements by the Employer to maintain the status quo terms of employment for its employees if the Union is not selected as the collective bargaining representative. Since the evidence shows that the Employer's statements contained in the "Extendicare Guarantees" document are merely promises to continue existing compensation practices, and are not promises of better, different, or new benefits for employees, the Employer's statements do not amount to objectionable conduct which would warrant setting aside the election. In addition, it can be argued that Employer guarantee numbers 1 and 4 can only be read in conjunction with the Employer's introductory paragraph to the "Extendicare Guarantees" document, in which the Employer expressly disclaims that it is allowed to make promises.

Accordingly, Petitioner's Objection 1 should be overruled.

B. Objection 2

Although the Petitioner argues that the "Extendicare Guarantees" document threatens employees with discipline and loss of benefits *if the Petitioner is selected as the employees' collective bargaining representative*, there are no items in the November 2005 document which make any such explicit threat. Only one item in the guarantee document makes any reference to a consequence for employees if the Petitioner's bid to represent them is successful; the remainder of the guarantees only recite consequences for employees in the case of an unsuccessful representation bid by the Petitioner.

Guarantee item 2 contains the lone reference to a consequence for employees if the Petitioner is successful by informing employees that if they choose the Petitioner's representation, the Employer would be obligated to bargain about evaluations and pay increases and that the Employer could not issue any raises until it finished negotiations with the Petitioner. As long ago established in NLRB v. Katz, 369 U.S. 736 (1962), once employees have selected a collective bargaining representative, an Employer is no longer entitled to make unilateral determinations regarding its employees' wages and benefits. All such decisions must first be bargained with the collective bargaining agent prior to implementation. As such, the Employer accurately states in guarantee number 2 that, if the Petitioner is selected as the bargaining representative by the employees, the Employer would be obligated to bargain with the Petitioner about employee evaluations and pay increases prior to issuing either of those items to employees.

While the Employer would be required, in the face of the Petitioner's selection as bargaining representative, to maintain its existing compensation practices (i.e. current fringe benefits and wage system) pending negotiations, those discretionary elements of the benefits and wage system must be bargained about with the employees' chosen representative. In the instant circumstances, undisputed evidence shows that for the last two years employees have received their wage increases in March of each year (i.e. "focal point pay increase"). The increase is

effective for the first full pay period in March. Employer testimony establishes that while past practice dictates that a pay increase occurs in March, the factors which determine the amount of increase an employee receives and the factors which determine which employees receive a focal point pay increase have varied. Employer testimony shows that over those past two years, the amount of raise an employee received depended on different factors each year. In the first year of the focal point pay increase program (2004), an employee's wage increase was dependent on a performance rating issued by the facility Administrator, the employee's employment tenure, and the employee's current rate of pay. In the second year of the focal point pay increase system (2005), the amount of an employee's raise was determined by considering the employee's employment tenure and the employee's current rate of pay compared to a wage cap for their position that had been implemented for the first time in 2005. In 2005, some employees were not granted any wage increase because their wage level at the time was at the highest point for their position. If an employee was "topped out" at the wage cap set for their position, that individual did not receive a focal point pay increase, although that employee may have received a focal point pay increase in 2004. The wage cap for each position was only instituted by the Employer in 2005, so it was not a consideration in 2004 wage increase determinations. In both 2004 and 2005, however, the raises granted to employees were limited by an overall payroll budget increase determined by corporate headquarters in the preceding September. In both 2004 and 2005, corporate headquarters limited the facility's payroll budget to an increase of 3% over the previous year's budget. While all of the factors corporate headquarters used in determining the new year's payroll budget are unknown, the company's profitability would clearly be a significant consideration and the company's profitability significantly depends on the amount of federal and state reimbursement it receives for services provided under governmental programs like Medicare.

As found in Oneita Knitting Mills, Inc., 205 NLRB 500, fn.1 (1973), the Board has ruled that, when a Union is selected as collective bargaining agent, the Employer is obligated to continue its established compensation practices, but that the Employer cannot continue to unilaterally implement those pay policies that require the exercise of Employer discretion. Here, the evidence does not reflect that the Employer has an established pay increase system since the only elements of the focal point pay increase program that have remained constant for two years is the timing of the raise (i.e. March) and the individual (Vice-President of Performance Management) responsible for determining the amount of increase each employee receives within the general parameters set by corporate headquarters. The evidence does not show that the Employer has a historical practice of issuing non-discretionary wage increases and, since the Employer would be obligated to bargain about the discretionary portions of their focal point pay increase program at a minimum, its guarantee number 2 – that raises could not be given to employees until negotiations with the Petitioner were completed, if the Petitioner was selected as collective bargaining representative – is an accurate restatement of the law and, therefore, is not an objectionable promise or threat.

Employer guarantee number 4 is the item on the "Extendicare Guarantees" document which references a loss of benefits. Although the Petitioner objects to this guarantee as a threat of reprisal for selecting the Petitioner as the collective bargaining representative, the actual verbiage used by the Employer states otherwise. Reading guarantee number 4 plainly, it states that employee benefits will not be lost through "trade-offs" in contract negotiations with the

Petitioner, if the Petitioner is rejected as the employees' representative. As discussed in the analysis for Objection 1, the evidence shows that each of the benefits referenced in guarantee number 4 is an existing benefit that the employees enjoyed prior to the instant representation petition. In addition to merely being a promise by the Employer to maintain the employees' existing compensation benefits, item 4, as issued by the Employer, is an accurate statement of fact: If the Petitioner loses the election, it would not be the employees' collective bargaining representative, therefore, no employee benefits could be lost to "trade-offs" during union negotiations because the Employer would not be obligated to engage in any union negotiations. While Employer guarantee number 4 does not really "guarantee" employees anything since it only amounts to a declaration that the Petitioner would be unable to negotiate for the employees' employment benefits if their representation is rejected, the Employer is privileged by Section 8(c) of the Act to make such an inconsequential statement as part of their campaign propaganda since it does not contain any unlawful or objectionable promise or threat of reprisal as alleged. See Gissel Packing Co., Inc., 395 U.S. 575 (1969).

Employer guarantee number 5 is the only item on the document which references "discharge". Like guarantee number 4 discussed above, item 5 actually states the inverse of what Petitioner's Objection 2 alleges: instead of threatening employees with discharge for selecting the Petitioner as their representative, guarantee number 5 states that employees will not be discharged for rejecting the Petitioner as their representative. Guarantee number 5, as written, is merely a promise by the Employer to observe their legal obligation under the National Labor Relations Act. The NLRA clearly forbids the Employer from discharging an employee for supporting the Petitioner, signing an authorization card for the Petitioner, or speaking in favor of the Petitioner, *regardless* of the outcome of the representation election. Item 5 is merely a promise by the Employer to abide by its obligation under the NLRA not to discharge an employee because of his or her union activities. The fact that the Employer limited its guarantee to abide by their lawful obligations only to the circumstance where the Petitioner is rejected, does not make the statement unlawful or objectionable. The Petitioner appears to be objecting to the Employer's failure to similarly promise to abide by the law if the Petitioner's representation bid is successful. However, there is no obligation that the Employer make *any* promises to uphold its legal obligations. The fact that the Employer made the promise in circumstances of the Petitioner's unsuccessful bid goes beyond anything required by the NLRA since the Act does not require the Employer give employees any assurances against unlawful acts, let alone that any assurances must cover all possible circumstances. Despite what the Petitioner may believe, the inverse of guarantee number 5 cannot be attributed to the Employer merely because they limited their promise to abide by the law to circumstances where the employees rejected the Petitioner, particularly when the Employer is not required to give any such assurance to employees at all. Ultimately, the Employer can only be held accountable for the statements that it actually issued in its "Extendicare Guarantees" document, not for their failure to include a multitude of other guarantees that the Petitioner would have liked to see appear in the same document. Item 5 on the guarantee document can only be read as a promise to abide by the law and makes no objectionable promise or threat of reprisal as alleged in Petitioner's Objection 2.

For all of the forgoing reasons, Petitioner's Objection 2 shall be overruled.

C. Objection 3

There are three guarantees that relate to the Petitioner's third objection that the Employer made misleading predictions concerning the nature and duration of bargaining, including loss of benefits and strike activity, if the Union were selected as representative. These alleged misleading predictions occur in Employer guarantee numbers 2, 4, and 9.

In guarantee number 2, the Employer informs employees that collective bargaining negotiations "could be months" in duration before an agreement is reached. There is nothing unlawful in an Employer informing employees of the realities of collective bargaining – that negotiations often do take months to complete. The Employer did not express that lengthy negotiations would be inevitable or that the Employer would refuse to bargain with the Petitioner if it was selected as the representative. Rather, the Employer expressly stated otherwise. Other portions of guarantee number 2 (i.e. "Extendicare will have to bargain") and the Employer's introductory paragraph (i.e. "everything is subject to negotiation") explicitly inform employees that the Employer would meet their obligation to bargain with the Petitioner if they were the chosen representative. The fact that the Employer advised the employees of the practical realities of contract negotiations – that it can be a lengthy process – is not objectionable, and is merely speech protected by Section 8(c) of the Act. Moreover, guarantee number 2 is not even properly a "prediction" about the duration of the negotiation process, as Objection 3 alleges, because the Employer's chosen word "could" clearly indicates that the duration of negotiations is not predetermined. The word "could" clearly leaves open the door that negotiations with the Petitioner might *not* take months, that the length of negotiations cannot be forecast. Without any threat that it would refuse to negotiate with the Petitioner or other promise, the Employer's guarantee number 2 is lawful speech protected by Section 8(c) of the Act.

By its Objection 3, the Petitioner appears to believe that the Employer's failure to disavow the inverse of guarantee number 4 (i.e. if the Petitioner wins the election, employees will lose the listed benefits during bargaining) and the inverse of guarantee number 9 (i.e. if the Petitioner wins the election, employees will go out on strike, employees will lose their jobs to permanent replacements, and employees will be required to pay union dues to keep their jobs) amounts to objectionable conduct. However, it is not proper to attribute such inferred statements to the Employer. The Board upheld the Administrative Law Judge's finding in Langdale Forest Products Company, 335 NLRB 602 (2001), that an Employer's similar guarantee assuring employees that they would not lose wages, benefits, or pensions if they rejected the union was lawful. In fact, the Board majority explicitly rejected the dissent's finding of an implied promise in the Employer's guarantee in Langdale. Here, in guarantee number 9, the Employer makes no claim of the inevitability of a strike or permanent replacements if the Union were selected as the employees' bargaining representative. While the inverse of guarantee number 9 suggests that strike activity and permanent replacements are possibilities in a unionized environment, such statements of strike possibility have been found to be lawful by the Board in Agri-International, Inc., 271 NLRB 925, 926 (1984). Here, the Employer's guarantees do not amount to threats to retaliate against employees for selecting the Petitioner as their collective bargaining representative, as alleged.

Accordingly, Petitioners Objection 3 should be overruled.

D. Objection 4

The Petitioner contends that the election should be set aside based upon unspecified “other statements” made by the Employer in the November “Extendicare Guarantees” letter which unduly influenced employees in their exercise of free choice at the polls. Beyond making the general conclusionary accusation contained in Objection 4, the Petitioner failed to identify those statements on the Employer’s guarantee document that it believes improperly influenced voters or even to articulate how these statements unduly influenced employees. Despite the non-specific nature of Petitioner’s Objection 4, review of the remaining Employer guarantees fails to show that that Employer made any objectionable statements which warrant setting aside the November 29, 2005, election. It is well settled that, absent threats or promise of benefit, an Employer is entitled to explain the advantages and disadvantages of collective bargaining to its employees, in an effort to convince them that they would be better off without a union. Custom Window Extrusions, Inc., 314 NLRB 850 (1994); Fern Terrace Lodge, 297 NLRB 8 (1989). As a whole, there is nothing in the document that is unlawful, as the document does not guarantee employees anything beyond the status quo. Each guarantee is either merely a restatement promising existing employee benefits or an accurate statement of fact and the Employer’s obligation under the law.

Accordingly, I will overrule Petitioner’s Objection 4.

III. DECISION AND ORDER

For the reasons discussed above, it is hereby concluded and ordered that Petitioner’s Objections 1, 2, 3, and 4, BE AND HEREBY ARE OVERRULED.⁶

IV. CERTIFICATION OF RESULTS OF ELECTION

It is hereby certified that a majority of the valid ballots have not been cast for the United Steelworkers – USW and that no labor organization is the exclusive representative of these employees in the bargaining unit described above.

⁶ On December 6, 2005, the Employer filed a “Renewed and Conditional Motion to Dismiss Petition for Supervisory Taint” with the Regional Director. Consistent with the Employer’s written request to withdraw its motion if the Petitioner’s Objections are overruled, the withdrawal of the Employer’s Renewed and Conditional Motion to Dismiss Petition for Supervisory Taint is hereby approved.

V. APPEAL PROCEDURE

Any party may, within fourteen (14) days from the issuance of this Supplemental Decision and Order, file with the Board an original and eight (8) copies of a request for review of this Supplemental Decision and Order in accordance with Sections 102.67 and 102.69 of the Board's Rules and Regulations. The request for review should be filed with the Executive Secretary of the Board, National Labor Relations Board, 1099 14th Street N.W., Washington, D C 20570. Copies of the request for review should also be immediately served upon each of the parties and the Regional Director.

Under the provisions of Section 102.69(g) of the Board's Rules, documentary evidence, including affidavits, which a party has timely submitted to the Regional Director in support of its objections and that are not included in this Supplemental Decision and Order, is not part of the record before the Board unless appended to the request for review or opposition thereto that a party files with the Board. Failure to append to the submission to the Board copies of evidence timely submitted to the Regional Director and not included in this Supplemental Decision and Order shall preclude a party from relying upon that evidence in any subsequent related unfair labor practice proceeding.

ISSUED AT Indianapolis, Indiana this 17th day of January, 2006.

Rik Lineback
Regional Director
NATIONAL LABOR RELATIONS BOARD
Region Twenty-five
Room 238, Minton-Capehart Building
575 North Pennsylvania Street
Indianapolis, Indiana 46204-1579

h:_r25com\Decision\D2510304SUPPLEMENTAL.doc